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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 476

JOSEPH M. MURPHY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Joseph M. Murphy, plaintiff in the Court below, through his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above case on March 13, 1964.

OPINION BELOW

The opinion of the Court of Claims (R. 161) is not yet reported.

JURISDICTION

Petitioner's motion for new trial and reconsideration was denied by the Court of Claims on June 12, 1964 (R. 182). The jurisdiction of this Court is invoked under 28 USC Section 1255(1).

QUESTION PRESENTED

Whether a former enlisted man of the United States Navy who, after serving honorably on active duty for more than 20 years and sufficiently long to qualify for transfer to the Fleet Reserve with retainer pay on account of length of service, under the provisions of the Naval Reserve Act

of 1938, as amended, may be denied his statutory right to transfer to the Fleet Reserve, although no disciplinary action is pending against him.

STATUTES INVOLVED

Section 204 of the Naval Reserve Act of 1938, c. 690, 52 Stat. 1175, 1179, as amended by Section 2 of the Act of August 10, 1946, c. 952, 60 Stat. 993, provides in material part as follows:

> "Members of the Navy who first enlisted in the Navy after July 1, 1925 * * * may upon their own request be transferred to the Fleet Reserve upon the completion of at least 20 years' active federal service. After such transfer, except when on active duty, they shall be paid at the annual rate of 2½ per centum of the annual base pay and longevity pay they are receiving at the time of transfer, multiplied by the number of years of active federal service * * * provided further, that all enlisted men transferred to the Fleet Reserve in accordance with the provisions of this section * * * shall, upon the completion of 30 years service, be transferred to the retired list of the Regular Navy, with the pay they were then legally entitled to receive * * * provided further, that a fractional year of six months or more shall be considered a full year for purposes of this section * * * in computing years of active federal service and base and longevity pay."

STATEMENT

Petitioner served honorably on active duty in the United States Navy from May 20, 1937, to August 17, 1947, when his then current term of enlistment expired. He attained the rate of chief gunner's mate in 1943.

During his last term of enlistment the petitioner having completed more than 19 years 6 months active naval service applied for transfer to the Fleet Reserve. His application was approved effective from December 3, 1947. Petitioner was never informed of the effective date of his transfer to the Fleet Reserve although he was told to elect the

method under which he wished to have his retainer and retired pay computed.

During the last two years of petitioner's term of enlistment he drank to excess and enough to definitely affect his mental processes. No complaint was made of his performance of duty, but he was involved in several absence offenses for which he was convicted at various times by two summary courts-martial and two deck courts. The offenses were handled as minor ones by the naval authorities.

On the expiration of his term of enlistment on August 17, 1947, petitioner departed from the ship to which he was then assigned and thereafter was administratively classed as a deserter (although his absence commenced after the expiration of his term of enlistment), until September 4, 1957, when he was apprehended as a deserter. He was held in confinement until January 24, 1958 when he was acquitted by a general court martial on a charge of desertion based on his absence from August 18, 1947, to September 4, 1957.

On March 31, 1958, he received a general discharge under honorable conditions pursuant to Article 10304, Bureau of Personnel Manual, providing for discharges by reason of expiration of term of enlistment. He unsuccessfully protested his discharge and sought transfer to the Fleet Reserve to the Chief of the Bureau of Personnel and the unsuccessfully sought relief from the Board for the Correction of Naval Records. He then brought suit in the Court below seeking to recover the active duty pay and allowances of a chief petty officer credited with his length of service from September 4, 1957, to March 31, 1958, and the retainer or retired pay of a chief petty officer credited with his length of service for the period from August 18, 1947. The Court below held that he was entitled to the active duty pay and allowances claimed but denied his claim to retainer or retired pay.

REASONS FOR GRANTING THE WRIT

1. The Court below has construed Section 204 of the Naval Reserve Act of 1938, as amended by Section 2 of the Act of August 10, 1946, *supra*, as giving the Secretary of the Navy complete and absolute discretion with respect to the transfer of an enlisted member of the regular Navy to the Fleet Reserve, even though he has qualified for transfer by serving honorably on active duty for the period prescribed by the statute, and there is no disciplinary action pending against him. The opinion of the Court below seems to have been primarily based upon its assertion that both counsel had, "advised us that the long-continued practice of the Navy in cases of this kind has been to deny a transfer to enlisted men with more than 20 years' service who were under charges or who had become involved in discreditable activities at or near the end of their service." (p. 4, Opinion.) Petitioner's counsel emphatically denies that the Court below was so advised by him or that he conceded that such a practice did, or had, in fact existed. As a matter of fact in a memorandum filed on January 13, 1964, at the request of the Court below, petitioner's counsel suggested to the Court that the case be remanded so that, "definite and positive testimony," could be obtained from the Bureau of Personnel concerning its practice with respect to transfers. An administrative practice is certainly no proper aid to the construction of a statute unless it is shown to exist and to have been consistent. *Cf. Billings* v. *Truesdale*, 321 U.S. 541; *United States* v. *Bergh*, 352 U.S. 40. Counsel will state that the naval authorities have on occasion followed a practice of permitting individuals who are subject to disciplinary action to accept an administrative discharge in lieu of standing trial on the charges preferred against them, even though such individuals have completed the prescribed period of service qualifying them for transfer to the Fleet Reserve. Such practice is in no way applicable to petitioner's case, however, for the petitioner had not been given the privilege of accepting an

administrative discharge in lieu of standing trial for an alleged offense, but, instead had been tried by a general court martial on the offense and acquitted. He then was given an administrative discharge although at that time *there were no charges preferred against him or any other disciplinary action pending against him.*

2. Another reason assigned by the Court below for upholding the action of the naval authorities in petitioner's case was that the, petitioner would have been unfit to perform active duty, had be been called upon to do so, after his transfer to the Fleet Reserve. (Opinion p. 4) The position taken by the Court ignores and disregards the fact first that, if petitioner was in 1947 a chronic alcoholic he had been a chronic alcoholic for a number of years prior to 1947 and had been able during that period to perform his duties as a chief petty officer to the satisfaction of the officers under whom he had served. Further the Court disregarded and ignored the fact that, if petitioner's chronic alcoholism rendered him unfit to perform service as a transferred Fleet Reservist, he could and should have been transferred from the Fleet Reserve to the retired list on account of physical disability as provided by Section 206 of the Naval Reserve Act of 1938, as amended, *supra.* Alcoholism is now generally recognized as a medical problem and properly should be handled as such. A most interesting discussion of alcoholism as a medical problem is found in the hearings before a sub-committee of the House Committee for the District of Columbia on H.R. 476, 80th. Cong., 1st Sess. The Court below consistently ignores the medical aspects of alcoholism, even where, as here, alcoholism certainly affected petitioner's mental processes and was responsible for the petitioner's departure from the Navy in 1947. *Cf. Rowe* v. *United States*, C. Cls. No. 256-60, decided July 17, 1964. It may also be stated that to counsel's personal knowledge the naval authorities have transferred men to the Fleet Reserve although considered unfit for recall to active duty, and a notation is made on the individ-

nal's file to the effect that he is not to be recalled to active duty.

It is significant that the Congress in 1958 enacted the Act of August 25, 1958, Public Law 85-754, 72 Stat. 847, which restores the right to retired or retirement pay to officers of the Armed Forces who have been dropped from the rolls because of unauthorized absence for at least three months or who have been sentenced to confinement in a federal or state penitentiary or correctional institution after having been found guilty of an offense by a court other than a court martial or other military court. In House Report 2156, 85th Cong., 2d Sess., the Committee considering the bill which ultimately was enacted as the Act of August 25, 1958, recognized that retired pay has been earned. It said p. 5:

> "In the cases of inactive officers entitled to retired or retirement pay, however, the Committee on Armed Services is of the opinion that such pay has been earned; that each person concerned should continue to receive that pay during all times when he is not legally incarcerated; and that any dependents of such person should receive whatever portions of such pay may properly be allocated to their support while the retired person is legally incarcerated."

The status of a retired officer of the Armed Forces is substantially similar to that of a transferred Fleet Reservist; each is subject to recall to active duty under substantially the same conditions. It is inconceivable that the Congress intended to deprive the enlisted man of his "earned" retainer pay while permitting an officer to receive his retired pay.

3. A further reason advanced by the Court below for the denial of petitioner's claim was that an enlisted member must be in an active duty status to be entitled to transfer to the Fleet Reserve. (Opinion p. 3) Assuming *arguendo* that the Court below is correct on this point, it affords no basis for the denial of petitioner's transfer to the Fleet Reserve. He was on an active duty status at the time his transfer to the Fleet Reserve was originally approved; he

certainly was on active duty status from the time he was apprehended until he was administratively discharged. The Court below has recognized this status by entering judgment in his favor for the active duty pay and allowances due him for that period. At that time he certainly had made application for transfer to the Fleet Reserve, which, if the former approval by the Secretary of the Navy was ineffective, was still pending.

4. The Court below concluded that it was not an abuse of discretion for the Secretary to refuse to transfer a man to the Fleet Reserve where, as here, his period of service culminated in an extended absence without leave. This statement is inaccurate for as heretofore pointed out, the petitioner's period of service did not culminate in an extended period of absense without leave, instead it was ended by administrative discharge after he had been tried and *acquitted* by a general court martial of the charge of desertion for the period which the Court below calls an extended period of absence without leave. This period which the Court below calls a period of absence without leave commenced on the day following the expiration of petitioner's term of enlistment. Under the circumstances it is not seen how it can be characterized as absent without leave. The court martial acquitted him of desertion, which would include the lesser included offense of absense without leave. *Res judicata* should preclude the respondent from asserting that petitioner was guilty of unlawful absence during the period. *United States* v. *Smith*, 4 USCMA 369, 15 CMR 369; *United States* v. *Doughty*, 14 USCMA 463, 32 CMR 463. Further, the naval authorities in giving petitioner a general discharge under honorable conditions have determined that his service during his last term of enlistment was satisfactory service, Article 10302(2), Bureau of Personnel Manual; *United States* v. *Kelly*, 15 Wall. 34.

5. The interpretation which the Court below has placed upon Section 204 of the Naval Reserve Act of 1938, as amended, seriously affects the rights and the privileges of every career enlisted member of the naval service. It is

contrary to the representations made by the Navy Spokesmen during the legislative history of the bill ultimately enacted as the Naval Reserve Act of 1938, *supra*.[1] It upholds

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[1] The Fleet Naval Reserve was first established by the Naval Appropriations Act of 1916, 39 Stat. 556, 587. Under that act the Secretary of the Navy was authorized to transfer to the Fleet Naval Reserve at any time within his discretion any enlisted man of the naval service with 20 or more years active naval service, and enlisted men with 16 years active naval service could upon the expiration of their current term of enlistment be transferred to the Fleet Naval Reserve upon their voluntary application therefor.

The Naval Appropriation Act of 1922, 42 Stat. 786, 799, contained a provision providing that men who had served for more than 12 but less than 16 years shall be permitted to reenlist and continue serving until they had completed 16 years service whereupon they shall, upon their own application, be permitted to transfer to the Fleet Naval Reserve. The Naval Reserve Act of February 28, 1925, 43 Stat. 1080, provided in Section 26, that men serving in the regular Navy on the date of approval of the act "shall be entitled to transfer on completion of 16 or more years naval service."

In 1935, the Secretary of the Navy appointed a board composed of officers of the Navy, the Naval Reserve, the Marine Corps and the Marine Corps Reserve, to study Naval Reserve problems. Its report and recommendations were approved by the Secretary of the Navy after all Chiefs of Bureaus and the Chief of Naval Operations had filed their comments. The approved report of the board was used as a basis for the drafting of the proposed new Naval Reserve Bill in the Navy Department. It was submitted to the Committee on Naval Affairs of the House of Representatives and the drafting of a new Naval Reserve Act was turned over to a Subcommittee of the Committee on Naval Affairs which commenced hearings on January 16, 1936, and which were concluded on January 27, 1936. These hearings are found in Volume 775, House Committee Hearings. In the course of the hearings there was some discussion as to whether the transfer of enlisted personnel to the Fleet Reserve was mandatory or discretionary with the Secretary. See pages 2188, 2200. In the course of this discussion the following colloquy occurred:

> "Mr. Lofgren [representing the Fleet Reserve]: Will those men who stay in the Navy expect to get out after 20 years'

the Secretary of the Navy's denial to these men of a right which the Congress has said they shall have upon com-

service, not at the discretion of the Navy. If they did not want to let them go, they would not have to let them go. They might make plans to stay in the Navy 20 years and then hope to take a position that might be available and then have the Navy Department say, 'we are not going to transfer you to the Fleet Naval Reserve.'

"Mr. Maas [Representative from Minnesota]: I think that this is a very important point. There must be a reason for the Navy Department's change in policy. I should like to know why they propose this change of policy. They probably have a very good reason for it, but I would like to know what it is.

"Mr. Delaney [Representative from New York]: You mean changing it from permissive to instructive.

"Mr. Maas: Heretofore it has been mandatory. Now it is at the discretion of the Navy. If they have a reason for it I would like to hear it.

"Mr. Delaney: Perhaps Captain Spears can answer that question.

"Captain Spears [representing the Department of the Navy]: Mr. Chairman I do not think there is any particular reason for that wording. *The Navy Department has no idea of preventing a man from going to the Fleet Reserve when his time is up.* We have some cases of men being on a cruise and not being available at the time. A lot of men probably would take a cruise to an Asiatic station about the time that they expect to go to the Fleet Reserve. He would get the benefit of the travel over there and the travel back, and the Navy Department, in order to avoid those extra expenses, wanted to have it provisional. But there is no intent to have any great delay there. And there is no objection to changing that wording. I suppose the Committee will do that when they get into executive session." (Emphasis added)

At page 2202, Mr. Burnham, a member of the Subcommittee, made the following observation which probably represented the true reason why the Congress did change the word "shall" to "may":

"Mr. Burnham: If that word 'may' were changed to 'shall', then a man could not serve in the enlisted service for more than 20 years. Would he be compelled to retire or be transferred at the end of 20 years?"

pleting a statutory period of service, and it enables the Secretary to completely destroy and take away that right despite the fact that no charges of any kind or any disciplinary action of any kind is pending against the individual concerned.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Grant of Certiorari should be granted.

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APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 218-61

(Decided March 13, 1964)

JOSEPH M. MURPHY

v.

THE UNITED STATES

Fred W. Shields for plaintiff. *King & King* were on the briefs.

Charles M. Munnecke, with whom was *Assistant Attorney General John W. Douglas*, for defendant.

Before JONES, *Chief Judge*, WHITAKER, LARAMORE, DURFEE and DAVIS, *Judges*.

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff is a former enlisted member of the Navy. He claims that he is entitled to, and has been wrongfully denied, active duty pay and allowances from September 4, 1957, to March 31, 1958, Fleet Reserve retainer pay from August 18, 1947, until his completion of 30 years' naval service, and, thereafter, retired pay except for the intervening period of active duty. Defendant has conceded that plaintiff is entitled to active duty pay and allowances to the extent of his claim. Plaintiff is entitled to retired pay only if he was entitled to be placed in the Fleet Reserve. We are, therefore, faced only with the question whether the Secretary of the

Navy's failure to place plaintiff in the Fleet Reserve was illegal.

Plaintiff asserts that his transfer to the Fleet Reserve was required by section 204 of the Naval Reserve Act of 1938 (52 Stat. 1175, 1179), as amended by section 2 of the Act of August 10, 1946 (60 Stat. 993). That section provides, in pertinent part, as follows:

> Members of the Navy who first enlisted in the Navy after July 1, 1925 * * * may upon their own request be transferred to the Fleet Reserve upon the completion of at least twenty years' active Federal service. After such transfer, except when on active duty, they shall be paid at the annual rate of 2½ per centum of the annual base pay and longevity pay they are receiving at the time of transfer multiplied by the number of years of active Federal service * * * *Provided further*, That all enlisted men transferred to the Fleet Reserve in accordance with the provisions of this section * * * shall, upon completion of thirty years' service, be transferred to the retired list of the Regular Navy, with the pay they were then legally entitled to receive * * * *Provided further*, That a fractional year of six months or more shall be considered a full year for purposes of this section * * * in computing years of active Federal service and base and longevity pay * * *.

Plaintiff first enlisted in the Regular Navy on May 20, 1927, and was discharged from that enlistment on July 18, 1931. He reenlisted on September 22, 1931, and served continuously until August 18, 1947, when he embarked on an unauthorized absence from duty that terminated with his apprehension by the FBI (Federal Bureau of Investigation) on September 4, 1957. Before his unauthorized absence began, plaintiff had applied for transfer to the Fleet Reserve by reason of having completed more than 19 years and 6 months of active service. This request was approved,

and the Bureau of Naval Personnel advised plaintiff's commanding officer that plaintiff would be transferred to the Reserve on December 3, 1947. However, during the interval between the date plaintiff made his request and the date the approval reached his commander, plaintiff was transferred to a different duty station. As a result, he was not immediately told that his application had been approved, and his subsequent absence from his ship prevented any later notification of the Bureau's action.

After plaintiff was apprehended, he was tried by court-martial for desertion and was acquitted. Thereafter, the Chief of Naval Personnel directed that he be discharged with a general discharge under honorable conditions, and this was done on March 31, 1958. In February of the following year, plaintiff applied to the Board for Correction of Naval Records for a correction of his records to show that he would be permitted to reenlist or, in the alternative, to show that he had been transferred to the Fleet Reserve as of August 17, 1947. The Board denied plaintiff the relief he requested, and its action was sustained by the Secretary of the Navy.

Plaintiff says that, since he has satisfied the statutory requirements as to length of active service, the Secretary was without authority to refuse to place him in the Fleet Reserve.

Recently, in *Unger* v. *United States*, Ct. Cl. No. 466-61, decided January 24, 1964, we held that an enlisted member of the Navy who was given an undesirable discharge after more than 20 years' active service was not entitled to the status and pay of a member of the Fleet Reserve under section 203 of the Naval Reserve Act of 1938, *supra*. We said that both section 203 and section 204 of that Act contemplate that an enlisted member must be in an active duty status to be entitled to transfer to the Fleet Reserve. In the case at bar, plaintiff was dropped from the rolls as a deserter

shortly after the beginning of his unauthorized absence until the date he was apprehended, and, after his court-martial, he was given an administrative discharge. The Secretary's approval of his application for transfer to the Fleet Reserve could not have subsisted after plaintiff had been declared a deserter. As a result, that approval never became effective, and plaintiff was not placed in the Reserve prior to his discharge. Plaintiff protested the administrative discharge given him after his acquittal by the court-martial on the ground that he was entitled to be placed in the Fleet Reserve, but, as stated, this was rejected. Therefore, he is not entitled to the benefits of a member of the Fleet Reserve unless the Secretary's failure to transfer him thereto was an abuse of discretion.

We do not think that the Secretary was without authority to refuse to accord plaintiff the benefits of section 204 of the Naval Reserve Act of 1938. Both counsel have advised us that the long-continued practice of the Navy in cases of this kind has been to deny a transfer to enlisted men with more than 20 years' service who were under charges or who had become involved in discreditable activities at or near the end of their service. That interpretation of the statute, long continued, and, so far as we know, unchallenged successfully, is entitled to respect. As applied to a person who is absent without leave for ten years and never voluntarily returned to his post of duty, we think it cannot be successfully assailed. Sections 203 and 204 were never intended to confer on such a person the right to demand transfer to the Fleet Reserve.

In his opinion, Trial Commissioner Mastin G. White stated that:

> * * * The purpose of establishing and maintaining the Fleet Reserve was to provide the Government with a trained body of men subject to recall to active duty when needed. *United States* v. *Fenno*, 167 F. 2d 593,

595 (2d Cir., 1948). The members of the Fleet Reserve were required by Section 206 of the Naval Reserve Act of 1938 (52 Stat. at p. 1179) to hold themselves in readiness to perform not more than 2 months' active duty during each 4-year period in peacetime, and to be examined physically at least once during each 4-year period. For this, they were compensated in the form of retainer pay. *Mulholland* v. *United States*, 139 Ct. Cl. 507, 510 (1957).

Since plaintiff was unavailable for further duty or for examination to ascertain whether he remained qualified for such duty, he could not fulfill the requirements for membership in the Fleet Reserve.

Therefore, we conclude that it is not an abuse of discretion for the Secretary to refuse to transfer a man to the Fleet Reserve where, as here, his period of service culminates in an extended absence without leave. *Peterson* v. *United States*, 155 Ct. Cl. 159, 292 F.2d 892 (1961).

Plaintiff is entitled to recover his active duty pay and allowances from the date of his apprehension to the date of his discharge. The case is remanded for proceedings under Rule 38(c) to determine the amount of his recovery. The petition will be dismissed as to the balance of plaintiff's claim.

Findings of Fact

The court, having considered the evidence, the report of Trial Commissioner Mastin G. White, and the briefs and argument of counsel, makes findings of fact as follows:

1. The plaintiff was born on July 8, 1907. He is a citizen of the United States and a resident of the State of California.

2. The plaintiff first enlisted in the United States Navy on May 20, 1927. Upon the expiration of his first term of

enlistment on July 18, 1931, the plaintiff received an honorable discharge. He immediately enlisted in the Naval Reserve. The plaintiff was discharged from the Naval Reserve on September 21, 1931, in order that he might reenlist in the Regular Navy. The next day, September 22, 1931, the plaintiff reenlisted in the Regular Navy. Thereafter, the plaintiff served in the Regular Navy through several successive enlistments. His final enlistment in this series was on August 18, 1943, for a 4-year term of service ending August 17, 1947.

3. On September 1, 1943, the plaintiff became a chief petty officer (chief gunner's mate). He continued to serve in that rating throughout the remainder of his naval service.

4. (a) In the latter part of 1945, the plaintiff began drinking liquor to excess. This excessive drinking continued throughout the remainder of the 4-year term of the plaintiff's then-current enlistment in the Navy. Because of it, the plaintiff no longer performed in a satisfactory manner duties commensurate with his rating.

(b) In December 1945, the plaintiff was absent without leave for a period of more than 18 days. He was convicted by a summary court-martial on January 8, 1946, of this unauthorized absence, and he was sentenced to confinement for 30 days and loss of pay in the amount of $312.

(c) On February 25, 1947, the plaintiff without authority missed the sailing of his ship. He was convicted by a summary court-martial on April 5, 1947, of this offense, and he was sentenced to loss of pay in the amount of $210, but this amount was later reduced to $105.

(d) On April 30, 1947, the plaintiff was absent without leave for 17 hours; and on May 5-6, 1947, he was absent without leave for 23 hours. The plaintiff was convicted by a deck court on May 10, 1947, of these offenses, and he was sentenced to loss of pay in the amount of $45.

(c) On May 23-29, 1947, the plaintiff was absent without leave for more than 6 days. He was convicted by a deck court on June 2, 1947, of this offense, and the sentence, as approved, included loss of pay in the amount of $40 and restriction to the limits of the station for 20 days.

5. (a) On June 4, 1947, the plaintiff transmitted to the Bureau of Naval Personnel (through his commanding officer) a written "Request for transfer, after 20 years' service, to Fleet Reserve." The document stated in part as follows:

> 1. Having served 19 years 07 months in the United States Navy * * *, I request transfer from general service to Fleet Reserve in accordance with existing laws, to be effected on or about (Set by BuPers).

(b) At the time of the submission of the request mentioned in paragraph (a) of this finding, the plaintiff was assigned to the U.S. Naval Receiving Station, San Francisco, California.

6. On June 27, 1947, the Bureau of Naval Personnel wrote a letter to the plaintiff's commanding officer regarding the plaintiff's request that he be transferred to the Fleet Reserve. This letter stated in part as follows:

> 1. * * * Please inform the subject man as follows:
>
> (a) On 3 December 1947 he will have 20 years, 3 months, 3 days active Naval service with retainer pay in accordance with Public Law 732—75th Congress, after transfer to the Fleet Reserve, at the rate of one-half base pay and on the retired list from the Fleet Reserve after completition of 30 years active and inactive service at the rate of one-half base pay plus permanent additions (longevity), provided there is not change in status.
>
> (b) On 3 December 1947 he will have 20 years, 3 months, 3 days active Federal service with retainer pay

in accordance with Public Law 720—79th Congress, after transfer to the Fleet Reserve, at the rate of two and one-half per centum of the base and longevity pay multiplied by the number of years of active Federal Service, plus 10% increases for extraordinary heroism if applicable; and when transferred to the retired list for retired pay will remain the same as his retainer pay, provided there is no change in his status.

2. The Commanding Officer is requested to insure that:

(a) Subject man thoroughly understands the above.

* * * * * * * * *

3. Please direct MURPHY to submit a written statement via his Commanding Officer to this Bureau * * * under which Public Law he elects to receive *retainer and retired pay.*

4. Upon receipt of the above statement, the Bureau will issue instructions concerning his transfer to the Fleet Reserve.

7. In a letter dated July 9, 1947, and addressed to the Chief of Naval Personnel, the plaintiff referred to the letter dated June 27, 1947, from the Bureau of Naval Personnel (see finding 6), and then stated as follows:

1. In accordance with reference (a) [the letter mentioned in finding 6], upon transfer to the Fleet Reserve, it is requested that I receive retainer and retired pay in accordance with Public Law 720—79th Congress, approved 10 August 1946.

8. On July 14, 1947, the plaintiff was transferred from the U. S. Naval Receiving Station in San Francisco to the Flag Administrative Unit, Commander Fleet Air, West Coast, San Diego, California, for further assignment.

9. (a) On July 21, 1947, the plaintiff was assigned to the U.S.S. BAIROKO in San Diego, California.

(b) The plaintiff was not given any duties to perform aboard the U.S.S. BAIROKO. He was regarded as being temporarily assigned to the vessel while awaiting the end of his enlistment. While assigned to the BAIROKO, the plaintiff spent most of his time ashore. His excessive consumption of liquor continued.

10. In a communication dated July 22, 1947, the Chief of Naval Personnel informed the commanding officer of the U. S. Naval Receiving Station, San Francisco, California, that the plaintiff's transfer to the Fleet Reserve was approved to become effective not earlier than December 3, 1947. However, prior to the receipt in San Francisco of this communication, the plaintiff had left San Francisco and had gone to San Diego because of the action referred to in finding 8. For some reason that does not appear in the record, information concerning the communication of July 22, 1947, from the Chief of Naval Personnel was not forwarded to the plaintiff in San Diego; and he was not otherwise advised of the formal approval of his request that he be transferred to the Fleet Reserve.

11. (a) The 4-year term for which the plaintiff had enlisted on August 18, 1943 (see finding 2) expired at the close of August 17, 1947. Sometime prior to 6 a.m. on August 18, 1947, the plaintiff—without awaiting further word concerning his request for transfer to the Fleet Reserve, and without taking any action to secure a discharge from the Navy—left the U.S.S. BAIROKO. He never returned to the ship; and for a period of approximately 10 years thereafter, the plaintiff's whereabouts was unknown to the Navy.

(b) The ship's clerk on the U.S.S. BAIROKO made an entry on the plaintiff's service record to indicate that he was "Absent over liberty from 0600" on August 18, 1947. A

the plaintiff's absence continued, he was administratively declared to be a deserter on September 19, 1947.

12. As the plaintiff's whereabouts was unknown to the Navy at the time, he was not transferred to the Fleet Reserve on or after December 3, 1947, in accordance with the action by the Chief of Naval Personnel that is referred to in finding 10.

13. After the plaintiff left the U.S.S. BAIROKO as indicated in finding 11, he continued his excessive drinking of liquor for approximately 5 years. During that time, he was unable to hold a job because of his excessive drinking, and he was largely supported by his second wife, whom he married on September 11, 1947.

14. In 1952, the plaintiff quit drinking liquor. He was aided in this program of abstinence by his wife, his physician, and Alcoholics Anonymous. Thereafter, the plaintiff became a steady worker.

15. On September 4, 1957, the plaintiff was apprehended in San Diego, California, by the Federal Bureau of Investigation as an alleged deserter from the Navy. On the same day, the FBI delivered the plaintiff to the U.S. Naval Receiving Station in San Diego. The plaintiff was retained under naval control for the purpose of a court-martial trial.

16. (a) On January 23 and 24, 1958, the plaintiff was tried in San Diego, California, on the following charge and specification by a general court-martial appointed by the Commandant of the Eleventh Naval District:

> CHARGE: VIOLATION OF THE ARTICLES FOR THE GOVERNMENT OF THE NAVY, ARTICLE 8, PARAGRAPH 21
>
> Specification: In that Joseph Michael Murphy, 346 38 43, chief gunner's mate, U.S. Navy, while so serving on board the U.S.S. BAIROKO, did, on or about 18 August, 1947, desert from said ship and from the

U.S. naval service and has remained in desertion until 4 September 1957.

(b) At the conclusion of the trial, the court-martial found the plaintiff "Not Guilty" of the charge and its specification.

17. After the plaintiff's acquittal as indicated in finding 16, the Chief of Naval Personnel, by means of a dispatch dated March 31, 1958, directed that the plaintiff be given a general discharge under honorable conditions pursuant to Article C-10304, Bureau of Personnel Manual. The Chief of Naval Personnel further directed that the plaintiff was not to be reenlisted in the Navy without the authority of the Chief of Naval Personnel, that the plaintiff's transfer to the Fleet Reserve was not authorized, and that no payments covering active-duty pay and allowances for the period from September 4, 1957, to March 31, 1958, were to be made.

18. The Navy issued to the plaintiff on March 31, 1958, a general discharge under honorable conditions.

19. (a) At the time when the plaintiff was discharged on March 31, 1958, as indicated in finding 18, he submitted to the naval authorities in San Diego, California, a written statement protesting the discharge. He called attention to the fact that he had completed the required 20 years of service for transfer to the Fleet Reserve, and that such a transfer had been applied for prior to the expiration date of his last term of enlistment. The plaintiff further stated that he intended to appeal to the appropriate authorities for an honorable, rather than a general, discharge and for transfer to the Fleet Reserve.

(b) The Bureau of Naval Personnel was informed on April 5, 1958, of the plaintiff's protest. The Bureau on April 8, 1958, pointed out that the plaintiff was privileged to submit a rebuttal concerning his general discharge and to

make a representation in support of an application for reenlistment.

20. (a) On April 16, 1958, the plaintiff submitted to the Bureau of Naval Personnel a rebuttal concerning his general discharge and a representation in support of his application for reenlistment in the Navy.

(b) On May 14, 1958, the plaintiff was informed that the administrative board of review appointed by the Chief of Naval Personnel had recommended that his reenlistment not to authorized, and, therefore, that the Chief of Naval Personnel did not authorize his reenlistment.

21. (a) Under the date of February 2, 1959, the plaintiff submitted to the Board for Correction of Naval Records an application for the correction of his naval record. The application requested:

> That I be permitted to reenlist in the United States Navy in the grade of Chief Gunner's Mate and apply for transfer to the Fleet Reserve or in the alternative that I be transferred to the Fleet Reserve in the rate of Chief Gunner's Mate credited with more than 20 years' service from 17 August 1947.

(b) A hearing relative to the plaintiff's case was held by the Board for Correction of Naval Records on August 24, 1959. The plaintiff was represented at the hearing by counsel.

(c) The Board for Correction of Naval Records rendered a decision on November 20, 1959, to the effect that no change, correction, or modification of the plaintiff's record was warranted.

(d) On December 8, 1959, the Secretary of the Navy approved the recommendation of the Board for Correction of Naval Records in the plaintiff's case.

22. The plaintiff instituted the present action on June 1, 1961, to recover:

(a) an amount representing the active-duty pay and allowances of a chief petty officer, credited with more than 20 years' service, for the period from September 4, 1957, to March 31, 1958; and

(b) an amount representing the retainer pay of a chief petty officer, credited with the plaintiff's length of service, for the period from August 18, 1947, until the completion of 30 years' total naval service, and then retired pay until the date of judgment (excluding the period from September 4, 1957, to March 31, 1958).

23. The defendant has conceded in the present litigation that the plaintiff is entitled to recover an amount representing the active-duty pay and allowances of a chief petty officer credited with more than 20 years' service, for the period from September 4, 1957, to March 31, 1958.

24. (a) No action, other than as stated in these findings, has been taken on the plaintiff's claim in Congress or by any of the Departments of the Government.

(b) No assignment or transfer of the plaintiff's claim, or any part thereof or interest therein, has been made; and no person other than the plaintiff is the owner or interested in such claim.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover active duty pay and allowances from the date of his apprehension to the date of his discharge, and judgment is entered to that effect. The amount of recovery will be determined pursuant to Rule 38(c) in accordance with this opinion. The petition is dismissed as to the balance of plaintiff's claim.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 476

JOSEPH M. MURPHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a–13a) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 13, 1964. A timely motion for a new trial was denied on June 12, 1964. The petition for a writ of certiorari was filed on September 9, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the court below correctly held that it was not an abuse of discretion for the Secretary of the

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Navy to refuse to transfer petitioner to the Fleet Reserve.

STATUTE INVOLVED

Section 204 of the Naval Reserve Act of 1938, 52 Stat. 1175, 1179, as amended by Section 2 of the Act of August 10, 1946, 60 Stat. 993, provides:

> Members of the Navy who first enlisted in the Navy after July 1, 1925, * * * may upon their own request be transferred to the Fleet Reserve upon the completion of at least twenty years' active Federal service. After such transfer, except when on active duty, they shall be paid at the annual rate of 2½ per centum of the annual base and longevity pay they are receiving at the time of transfer multiplied by the number of years of active Federal service: * * * *Provided further,* That all enlisted men transferred to the Fleet Reserve in accordance with the provisions of this section * * * shall, upon completion of thirty years' service, be transferred to the retired list of the Regular Navy, with the pay they were then legally entitled to receive: * * * *Provided further*, That a fractional year of six months or more shall be considered a full year for purposes of this section * * * in computing years of active Federal service and base and longevity pay * * *.

STATEMENT

Petitioner, a former enlisted member of the Navy, seeks review of a decision of the Court of Claims dismissing his claim for Fleet Reserve retainer pay and retired pay. The pertinent facts are set forth in the court's opinion and may be summarized as follows:

After completing 19 years and 7 months in the regular Navy, petitioner requested a transfer to the Fleet Reserve on June 4, 1947. The Bureau of Naval Personnel approved his request and advised his commanding officer, in a communication dated July 22, 1947, that petitioner would be transferred to the Fleet Reserve on December 3, 1947. Prior to receiving notice of the Bureau's approval, however, petitioner was transferred from San Francisco to San Diego, California, and assigned to the U.S.S. *Bairoko*. The information contained in the Bureau's communication was not forwarded to petitioner at his new duty station.

Petitioner's term of enlistment expired on August 17, 1947. Some time prior to 6 a.m. on August 18, 1947, petitioner left the U.S.S. *Bairoko* without awaiting further word concerning his transfer and without taking any action to secure a discharge from the Navy.[1] As his whereabouts were unknown to the Navy, petitioner was not transferred to the Fleet Reserve on December 3, 1947. Some ten years later, on September 4, 1957, petitioner was apprehended by the Federal Bureau of Investigation as an alleged deserter from the Navy. He was tried by a general court-martial on this charge and on January 24, 1958, was found not guilty. Thereafter, the Navy issued petitioner a general discharge under honorable conditions.

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[1] In the latter part of 1945, petitioner had begun drinking to an excess. On four occasions during the next two years, he was absent without leave for varying periods of time. As a result, petitioner was convicted twice by a summary court-martial and twice by a deck court.

On April 16, 1958, petitioner submitted to the Bureau of Naval Personnel a rebuttal to his general discharge and, in addition, a representation in support of his application for reenlistment in the Navy. Upon recommendation of an administrative board of review, the Chief of Naval Personnel did not authorize petitioner's reenlistment. Petitioner then applied to the Board of Correction of Naval Records for a correction of his records to reflect that he was permitted to reenlist in the Navy and to apply for a transfer to the Fleet Reserve or, in the alternative, that he was transferred to the Fleet Reserve retroactive to August 17, 1947. The Board determined that no change, correction, or modification of petitioner's record was warranted, and its determination was sustained by the Secretary of the Navy.

On June 1, 1961, petitioner instituted this action in the Court of Claims, seeking (a) active duty pay and allowances from September 4, 1957, the date he was apprehended by the FBI, to March 31, 1958, the date he was discharged from the Navy, and (b) Fleet Reserve retainer pay from August 18, 1947, until his completion of 30 years' naval service and, thereafter, retired pay, except for the intervening period of active duty. The Court of Claims held that petitioner was entitled—as the government had conceded—to recover active duty pay and allowances from the date of apprehension to the date of discharge, but dismissed his petition as to the balance of his claim (Pet. App. 13a). The court reasoned that petitioner was "entitled to retired pay only if he [had been] entitled to be placed in the Fleet Reserve" (Pet.

App. 1a). And, the court determined that whether an enlisted member of the Navy was entitled to be transferred into Fleet Reserve was a matter which was discretionary with the Secretary of Navy (Pet. App. 4a). The court concluded that "it is not an abuse of discretion for the Secretary to refuse to transfer a man to the Fleet Reserve where, as here, his period of service culminated in an extended absence without leave" (Pet. App. 5a).

ARGUMENT

Section 204 of the Naval Reserve Act of 1938, 52 Stat. 1175, 1179, as amended by Section 2 of the Act of August 10, 1946, 60 Stat. 993, provides, in part, that members of the Navy who enlisted after July 1, 1925, "may upon their own request be transferred to the Fleet Reserve upon the completion of at least twenty years' active Federal service."[2] The Court of Claims, adhering to its earlier decisions in *Unger* v. *United States*, 326 F. 2d 996, and *Peterson* v. *United States*, 292 F. 2d 892, held that, under this language, the granting of a request for transfer lies within the discretion of the Secretary. That construction is clearly correct. The immediately preceding section of the Act, Section 203, provides that men who enlisted *prior* to July 1, 1925, "shall be entitled to be transferred to the Fleet Reserve" on the completion of sixteen years' service.[3] The use of the permissive

[2] In the codification of Title 10 in 1956, the essence of Section 204 was codified in Section 6330.

[3] Sections 203 and 204 of the Naval Reserve Act of 1938 are merely restatements of Sections 26 and 23, respectively, of the Act of February 28, 1925, 43 Stat. 1080, 1087.

"may * * * be transferred" in Section 204 is in significant contrast to the mandatory "shall be entitled" in Section 203. Nothing in the legislative history of Section 204 suggests that Congress intended the word "may" to mean "shall" or "must." S. Rept. No. 2082, 75th Cong., 3d Sess., p. 6; H. Rept. No. 2465, 75th Cong., 3d Sess.; 83 Cong. Rec. 8213.[4] In other contexts, "may" has been given its normal and commonly understood meaning, in accordance with familiar rules of statutory construction. *Old Colony R. Co.* v. *Commissioner of Internal Revenue*, 284 U.S. 552, 560; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U.S. 1, 36–37.

Moreover, it was plainly not an abuse of discretion for the Secretary to refuse to transfer petitioner to the Fleet Reserve. As the Court of Claims pointed out (Pet. App. 5a), petitioner could not have fulfilled the requirements for membership in the Fleet Reserve (Section 206 of the Act, 52 Stat. 1175, 1179; *United States* v. *Fenno*, 167 F. 2d 593 (C.A. 2)). For, since his whereabouts were unknown to the Navy, he was unavailable for recall to active duty or for examina-

[4] Petitioner contends that the Court of Claims' interpretation of Section 204 "is contrary to the representations made by the Navy spokesmen during the legislative history of the bill ultimately enacted as the Navy Reserve Act of 1938, *supra*" (Pet. 7–8). Those representations, however, were made in connection with Section 203, not 204. Hearings Before the Committee on Naval Affairs, House of Representatives, 74th Cong., 2d Sess., pp. 2113–2114, 2200–2201. The colloquy reproduced in footnote 1 on pages 8 and 9 of the petition began after the Fleet Reserve spokesman, Mr. Lofgren, had suggested that Section 203 in the proposed bill—which provided, in part, that "Men serving having enlisted prior to July 1, 1925, may be transferred"—be changed to read "Men serving having enlisted prior to July 1, 1925 shall be entitled to be transferred."

tion to determine if he remained qualified for such duty.[5]

In sum, the decision of the Court of Claims is correct and presents no occasion for further review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1964.

[5] Contrary to petitioner's contention (Pet. 5), the court below did not state, as a reason for upholding the Secretary's decision, that petitioner's alcohol problem rendered him unfit for active duty. Rather, the court was of the view that petitioner "could not fulfill the requirements for membership in the Fleet Reserve," *i.e.*, fitness for active duty, because his unauthorized absence rendered him "unavailable for further duty or for examination to ascertain whether he remained qualified for such duty" (Pet. App. 5a).

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